

Oct 3 1972

Nov: the following is a draft of the opening with additional markings for revision. I should like proposed corrections, additions, deletions by Monday night next if not sooner (on writing presently).
LBB.

1. Index
2. Introduction of Counsel and Clients
3. The Indictment and our General Response
4. Identification of the Defendants and Co-conspirators
5. The 1967 decision to "Study the History of United States involvement in Vietnam," and its writing and completion
6. The disposition of the Pentagon Papers by Warnke, Gelb and Halperin, with their private Papers
7. Their delivery to Ellsberg in connection with his work. April 1969 (10 vols.), August 1969 (8 vols.)
8. His reading of them, what they revealed, their effect upon him, and his decision to give them to Congress.
 - a) awareness of Government failure to disclose to public
 - b) awareness of Congress' demands never yeilded to
 - c) conclusion that deception (Bay of Tonkin)
9. Implementation of the decision by Ellsberg, Russo, et. al.
 - a) xeroxing
10. Giving to Fulbright. Fulbright's use of them.
11. Their eventual publication by: 1) L.A. Times (over?)
2) G.P.O.

MASTER-CRAFT-KALANATCHI, HIGH U.S.A. 1962-1987

11 (cont'd)

3) Gravel

4) N.Y. Times

12. The Government's claim of consipracy to commit crime

13. The Government's claim of theft

14. The Government's claim of national defense

15. The Government's claim of lawful governmental function

17. Conclusion

2. Introduction of Counsel and Clients

3. Indictment and General Response

A. Complexity

B. Same as general state of facts underlying the 15 Counts

a) stealing government property II-VII
(answer: no theft and no gov't property)

b) Retention and releasing nat. def. docs. VIII-XV
(answer: lawful possession, not
nat. defense) *not "released" to co-consp*

c) Conspiracy to do (a) and (b) Count I, pt. 2.
(answer: no conspiratorial agreement
to commit crime)

d) Conspiracy to defraud U.S. of lawful govt. function
(answer: (i) no such classification program
in actual practice) Count I, pt. 2.
(ii) apparently govt. theory that
"information" belongs to the DoD
and not to Congress and American
citizens

C. Minimal dispute as to facts; much re implications
such as "stolen," "unauthorized possession,"
"national defense" willful or evil motive, particularly
of conspiracy

(3, cont'd. page 2)

D. What the case is not:

1. Not espionage case of giving secret to enemy
2. Not doing anything with reason to believe U.S. would be injured or a foreign power aided.

3. Not a "code" case *or RD (statistics)*

E. The documents and papers involved

1. Principally the historical study of 47 volumes, subsequently published in large part by govt. itself.
2. The Gurtov study of 1954 Geneva negotiations
3. a 1968 Wheeler report - outdated by 1969.

(Note combination of Wheeler - DE memo)

A

RUSO

1) Graduate school at Princeton. (prior education?)

2) Employment history (get from T. Russo)

3) RAND employment (get from T. Russo)

(explain RAND)

a) 18 months in Saigon in RAND's [get the study]

(Feb-1965)

Viet Cong motivation and morale project (administering

team of Vietnamese interviews of N.L.F. prisoners)

Then b) Study of crop destruction in Vietnam [get details]

Relationship between N.L.F. and rural population:

i) the way they depended upon the people

ii) social and economic patterns of support for
Vietnamese people

[when was this study made -- is it available]

4) Was there not difficulty with Westmoreland and support

by U.S. Embassy [on what issue?]

B. Ellsberg

Academic: Ph.D. Harvard Economics

Military: 1954-7 Marine Corps.

RAND: 1959, 1967

studies past crises

⁶²⁻ 1969 studied lessons of Vietnam

Government: 1964 Sp. Assist. Intl. Security Affairs
(on VN Policy)

1966 Sp. Assistant to Dep. Ambassador

1967 Task force

[Ellsberg to add a few salient items to the foregoing]
[
[we have a chronology and curriculum vitae;
[the question is one of selection for relevance
[and psychological effect]

Work with VN - Aug. 1965

4, cont'd (page 3)

C. Sinay

4, cont'd (page 4)

D. Vu Van Thai

See his Fighting and Negotiating in Vietnam: a Strategy

Memo RM-5997 ARPA. Oct. 1969

5. The 1967 decision to "Study the History of United States
Involvement in Vietnam: its writing and completion

A. Decision of McNamara to make the study

B. Halperin in charge

Then Deputy Asst. Sec'y Defense

prior academic career

taught at Harvard

C. Gelb made Director of Task Force

D. Coopting the staff from research institutions like Rand
and from government. (Query: from universities
as well?)

E. Completion by Jan. 1969 after
election of Nixon

Changes in Defense Secretaries

38 volumes actually typed

6. The Disposition of the Papers in January 1969
by Warnke, Gelb & Halperin

- A. Standard govt. practice of retiring govt. officials from Presidents down to take their personal papers with them including government papers upon which they or their subordinates worked.

Illustration: Pres. Johnson

*does of period
"Old by rule"*

Places of deposit: their homes, their offices

National Archives by deed of grant

University libraries

(check Pres. Libraries Act).

B. Application of this practice by Warnke, Gelb & Halperin

- (i) decision to deposit with Rand, not Johnson

- (ii) letter agreement December 18, 1968 with Rand

(see July 1, 1971 Rand cert. [Def. Exhb. B1
Ref. Exh. B 26) Read]

- (iii) deposit of 5 cartons w Rand D. C. --
but not in Rand Security System [carton contents]

(explain private safe out-of system practice).

- (a) given to Archer, not to Top Secret Control Officer

- (b) not in log of top secret documents

- (c) no Rand top secret cover

- (d) put in special safe

this detail?

(6, cont'd page 2)

C. As a result

The 38 volumes were treated as their private papers;
They remained under their control;
They were kept at Rand not at a government office.

D. Possible brief decisions of Halperin, et al.

Gelb - March April 1969 leave DoD

Warnke - March April 1969 leave DoD

Halperin DoD

White House (Kissinger)

Sept. 1969 Leaves govt. employ

The Disposal Several Months Later of the Completed Set

A. By July 1969 the entire 47 volume set was typed

B. By this time Warnke, Gelb & Halperin who had remained several months with the Nixon Administration went out of the government.

C. Secretary of Defense Laird's assistant upon finding the study asked Gelb (?) who should get it

D. Gelb (from Brookings) wrote July 8, 1969 to citizens in private life once associated with the govt. asking "If you want to receive your set, etc."

Katzenbach	IBM	Copies sent to:
		Pers. State Dept. Safe
Warnke	Clifford, etc.	
Nitze	John Hopkins	Pers. Pent. Safe
Clifford		Office Safe
McNamara	World Bank	Natl. A or Johnson Lib.
Wm. Bundy	(M.I.T.)	Brit. Col.
	(writing book)	

E. The 18 volumes entered the system May 20, 1971

The 47 Oct. 3 [date obscure]

Accounting to July 1, 1971 Rand certificate, Ref. Exh. B 26

F. The Disposal of the Galb, Warnke & Halperin copies of full set.

(1) July 14, 1969 (Brookings letter of Gelb to Rowen) referring to "the McNamara - Clifford" approved recipients.

(2) The 3 wish to store "full sets at Rand" D. C.

(3) This was done (check

G. Eventually, June 29, 1971 Halperin makes a gift of his papers to the Archivist of the U. S.

(44U.S.C. Chapter 21).

[Query: Why relevant?]

7. The Delivery to Ellsberg of the Originally
Deposited volumes in April and August 1969
in Connection with his Work.

A. The government has evolved a conspiracy theory that on or about March 1, Ellsberg, Russo & Sinay & Vu Van Thai entered into an agreement to steal government property and disclose natl defense documents.

B. This is based upon the fact

(i) On March 1, 1969 D.E. received 10-vols. of his study deposited Jan. 1969 with Warnke, et. al. and private papers in a private safe at Rand D.C. outside the system.

(ii) That in August 1969 the same event occurred re 8 more vols.

(iii) That he promptly brought them to Rand's S.M. office, putting them in his own safe not in Rand's Security System governed by the Security Manual & Rules

c. What are the actual facts?

- (1) Ellsberg's current Rand project on VN lessons for which he needed the volumes
- (2) Approval by Gelb after talking w. Halperin & Rowen
- (3) Henderson courier pass
- (4) By passed top secret control officer
- (5) deposit in our safe
- (6) established practice
- (7) no secret: ^{+ ns} Moorsteen knew (and Wolf)
- (8) Sinay, Vu Van Thai, Russo, did not know that Ellsberg was taking the volumes to S.M. (check on Russo re Aug. 1969)

[Query: The Best and Butler affidavits are
limited to the 47 volume study and indicated
his authorization.

from March 3, 1969	to May 30, 1970
August 28, 1969	to May 20, 1970

Do we have any other statements of these two
persons on the study. Gurtov Memo or JCS Memo?]

8. HIS READING OF THEM AND DECEPTION

a) The period of his reading in connection with his RAND work
on lessons (set at desk)

b) Lessons learned:

1) To conduct the war the president was forced to lie
to the American people.

2) During the 1964 campaign President Johnson's position

DE
against escalation. (see ~~Willsman's~~ on his actual
intention if provable)

|| 3) 1965 decision to bomb North Vietnam and conceal the
fact from the American people.

4)

(3, cont'd) page 2

composition of chronology & calculations will be
[*add: the following ~~composition~~ is*
reorganized & abbreviated into some workable scale]

WAR PERIOD: _____ Ho Chi Minh -- French -- U.S. v. Japanese control

1946 Ho's appeal, our rejection of appeal

French determination of reconquest

1949 China

1950 Korean War

1950 We began to pick up costs; Marshall plan aid

1954 We were assuming 80% of costs; serious talk

of using nuclear weapons. [check for references in P

1954 Geneva conference plus agreement on temporary

partition and elections in 1956. Our decision

to subvert it because of communist issue (that

~~the year 1954~~ *the year 1954 was only and end* being the year 1954 -- ~~to was~~ and of McCarthy period)

We issued declaration (unilateral) that we would

not use force to subvert the agreement.

Possible deception of Eisenhower by Dulles

Violation of agreement:

1) Lansdale's forays into North Vietnam

(Lansdale was Ellsberg's superior at one point)

2) Collaboration with Diem not to hold the 1956

election (Eisenhower's remark)

Quote JCS concurrence if true [Curt W.D.B.].

(missing from Halperin Memo, p. 14)

(not in Gravel)

[see later legal analysis to be developed a memo suggested in copying
re the violation of Geneva Int'l Law & U.N. Charter]

~~the~~
1960-1961 Clear, Saigon government lacked popular support

Kennedy sent McNamara and Taylor

Decision: increase American troops 700-15,000

still to be called advisors (Advisors

were actively engaged)

IV.B.5

1963 Oct. Diem overthrow. U.S. people not told of our involvement.

IV.C.5

Phase I in buildup

a) 1965 decision of Johnson Administration

b) Associates directed to conceal fact

[quote]

c) Americans told troops at request of people of South Vietnam

d)

Sept. 8, 1964 (MEMO: Taylor, Rusk, McNamara, Wheeler)

(Gravel ed., vol 3, pp. 561-62)

~~Question: Extent to aid claimants to obtain action found deliberately to provoke DRV reaction and consequent retaliation by us.~~

penning

[Sept. 10, 1964 -McG. Bundy (book, President's acquiescence) ?]

Sept. 1964 Tonkin Bay Resolution

Nov. 1964 --elections

--in fact planning escalation. [proof?]

Feb. 1965 Air bombing of North Vietnam

March 1965 First North Vietnamese forces in South Vietnam
(starting to fight)

VI.C. NEGOTIATIONS

(Dec. 65, Jan. 66 37 day bombing halt)

(clear only purpose to strengthen hand for further escalation)

Query: what documentary support?

DECEPTION

A) Query was there deception with respect to our raids
of Feb. 1965

B) Deception with respect to April 1965 decision to
change to an offensive by Marines.

April 1, 1965 News Conference: GPO, IV.C.5-1240

McGeorge Bundy, p. 126: President wants "these
movements and changes should be understood as being
gradual and wholly consistent with existing policy."

(April 17, 1965: Ambassador (3 Gravel 704-5) states
difficulty of persuading South Vietnam
to permit outside troops)

Ellsberg's sense of

- a) necessity that American people know facts
- b) responsibility because of his participation
- c) realization of the facts
- d) concern that the decision making process be revealed to Congress and the American people

Each of these concerns was manifested by Congress which

- (a) felt deceived by the Tonkin Bay incident
Thuringer move
- (b) repeatedly, Symington & Fulbright particularly sought information from the Pres., State Dept. & DoD without success.

10. Fulbright and the Congress

- March, 1968 : Senate Foreign Relations Committee
requests of the Department of Defense
NSAM 288, p.56 Gravel volume 3.
- WSEG. Comment and Central Study
 - the Ponturo Study on Tonkin refused.

Giving it to Fulbright

- a. Ellsberg's meetings with Fulbright and his staff.
 - (see D.E.'s dictated material)
 - (see D.E.'s diaries)
- b. Ellsberg's giving the volumes to Fulbright.
- c. Fulbright writes Laird for the study. (Nov.11, 1969)
 - Laird answers: No. Dec.20, 1969
 - Fulbright Jan. 19, 1970
 - Laird Feb. 18, 1970
 - Fulbright Apr. 20, 1970
 - Fulbright July 10, 1970
 - Laird July 21, 1970
 - Fulbright (not limited to P.P.'s) Apr. 30, 1971
 - Johnson May 19, 1971
- d. Dan's giving material to other congressmen.
- e. N.Y. Times, L.A. Times
- f. publication in 1) G.P.O. edition
2) Gravel edition

" our short chronology says Feb. 1970 ; check the date "

12. Government's Conspiracy *them*

13. The government's claim of theft of government property.

A. The claim of theft of the Gurtov papers is untrue

-Government claims Ellsberg obtained it April 7, 1969 from Rand and stole, retained, concealed etc., it-
Mar. 4, 1969 to May 20, 1970.

Conclusion: (possibly not to be stated)

Government assumes that because (1) Robert's fingerprints are on it, (2) Robert xeroxed some thing, (3) they were in authorized possession of Ellsberg:

(a) they were removed to Sinay.

(b) they were xeroxed by Robert.

Our answer:

(1) his getting them officially he had authorized possession from Butler shows he didn't steal them;

X (2) xeroxing is not stealing.

(3) even if removed overnight, for xeroxing, it is not stealing.

X (4) is it government or Rand property?

B. JCS (Wheeler) not stolen

(1) perculiar that the man who put it in Rand system is accused of stealing it; he had authorized possession.

(2) xeroxing is not stealing.

Q (3) took it with Butler's permission.

C. The McNamara Study

No theft in common sense meaning of that term.

(1) Ellsberg had authorized possession.

(2) Whatever of P.P.'s was xeroxed was returned.

It was returned immediately, next morning, so that not even Rand was deprived of its use. In fact, only one using it then was Ellsberg. When he left Rand in May of 1971, he turned it over to Moorsteen.

(If the government is seeking to claim a theft of information): Even if he had kept it out a long time, it would have been difficult to show that anyone had been deprived of its use in view of the large number of copies inside and outside the government.

(3) The government's attempt to rely upon the classification system with respect to the P.P. incorrectly assumes that they had been put into the system and were governed by Exec. order 10501, the Industrial Personnel Security Clearance Program, the Industrial Security Manual and the Rand Manual.

(4) But if they had been put into the Rand Security System the security system was not violated because it does not operate rigidly and literally giving classified documents only to "cleared" people. Note exceptions: judges, juries, Congressmen, defense counsel,

----newspaper men etc.

(5) The mass of regulations which the jury will see are often different if not contradictory. But in essence they are reflected in E.O.

10501 standards and trustworthiness. Our concern here is with two or at most three

AR, Feb 7

people since Sinay if she did anything had the manual job of xeroxing. -- hardly a receiver of stolen goods or national defense information.

(a) Ellsberg had more than top secret clearance.

(b) Russo's trustworthiness was obvious because he had just finished his Rand work under a clearance and shortly was going to work for Rand with a security clearance.

(c) If it turns out that VuVan Thai actually read any of the documents, we shall show the official Rand records declared him trustworthy.

(6) The entire set had been sent to people like McNamara deemed trustworthy by no longer inside the government or needing the materials for government or needing the material for government work.

14. The government's claim of national defense.

a. Appears in Count one, part 2 (b) (c) (d)

Counts 8 - 15

b. Relates to 3 sets of papers

(1) P. papers: United States - VN Relations

(2) 8 pages of a report of Chairman of JCS (Wheeler Report)

(3) Feb. 27, 1968 Gurtov memo re 1954 conference.

c. The Pentagon Papers

(1) reveal history. not current military operations or plans.

a] see Gelb letter of transmittal. *9.20.2011*

b] see ~~then~~ ^{new} contents

c] hear the experts

d] common sense *ultimately of its going*

(2) reveal things already published in books, memoirs, newspapers before the events of Mar. 1, 1969 to Sept. 30, 1970 set forth in the indictment.

(a) Court will eventually charge you that materials in the public domain are not national defense.

(b) The Pentagon Papers themselves contain footnotes showing the extent to which the writers of these historical studies relied upon the books already published and naming the very books and articles.

- (c) They reveal things which the government itself recognizes as not presenting any military problem by subsequently publishing through the Government Printing Office (G.P.O.) in 1971 for \$50.. Thus, they made the Pentagon Papers available to foreign countries, foreign agents, etc.
- (d) The books reveal no matters not ~~known~~^{already} to the North Vietnamese, the Chinese government, the Canadian government and probably many others.

(3) ~~1~~ Diplomatic not N.D.

(4) No intention of slightest harm but of great good to the American people.

(5) Classification does not determine national defense.

on national defense issue

(6) If government presents experts, we will do so ourselves; we have consulted a large number of distinguished experts whose names we have supplied to the Court.

CONCLUSION In the end your common sense will tell you whether or not this is history. Officially described as history ~~is~~^{is} not really that and ~~that~~ it contains no military information but information needed by the American people.

-- The government's claim that the negotiation volumes ~~discuss~~ something about our diplomatic negotiations and therefore it relates to the national defense.

1] National defense (~~Def.~~ of Def.) is different from negotiations. (State Dept.)

2] the fact that the U.S. gov't. might be embarrassed (if it were) does not mean it relates to the national defense, but that ~~it relates to the fact that~~ perhaps the government should not do embarrassing things.

3] the revelations of 1964 secret diplomacy can hardly affect the open diplomacy of direct talks in 1970.

4] whom are we fooling? the North Vietnamese knew of the secret negotiations because they were a party to it.

5] every major point was made in the ~~Harlow~~ ^{Harlow} Lowry book published in

-- Examples from the Papers of the irrationality of the government's national defense claims.

1] explain that the government was required by Court

to give us a statement of what and why in the Papers was related to the national defense.

- 2] Cite examples from the Blackstock memo on "intelligence" referring to the following books inter alia:

Robert Shaplen, The Lost Revolution, (NY, 1965)

Black and Thornton, Communism and Revolution (Princeton, 1964)

Chester A. Cooper, Foreign Affairs, April, 1968.

Geo. Carver, Foreign Affairs, April 1966.

Chester Cooper, The Lost Crusade

Senate Hearings, March 1966.

David Halberstam, The Making of a Quagmire, (NY, 1964)

Needed:

- examples from the Papers covering the government's other sub-headings in the Bill of Particulars.

e.g., U.S.-Allied relations

- assessment of communist threat
- U.S. evaluation of allies.
- confidential negotiations, channels and assessments therein.

~~full analyses of the materials by David Halberstam (in the process of typing?) and by Sam Miller (Mark Rosenbaum to go)~~

① - The Gurtov Memo and the National Defense

(1) referred to in Count one

p.3: April 7, 1969, Ellsberg obtained it from Rand in Santa Monica.

(2) reference in Counts :

II - p.6-7

Ellsberg stole it between March 4, 1969 and May 20, 1970.

III - p.8-9

Ellsberg concealed and retained it in the same period.

VIII- p.14

Ellsberg received it April 7, 1969, intending to dispose.

14 - p.22-23

Ellsberg unauthorized possession; willfully retained.

(3) what the Rand logs show (presumably April 7, 1969 ^{receipt} ~~receive~~)
(presumably upon return) return ^{20.0.0. 3 214}

(4) what the fingerprint records show:

Robert Ellsberg

- The Gurtov memorandum's Relationship to the Gurtov P.P.'s

Query: Does it contain anything different which was done first? ^{20.0.0. 3 214} ~~20.0.0. 3 214~~

Who in Rand had been given access to it?

(5) The Gurtov Memo does not relate to the national defense.

(a) It is pure history.

(1) It deals with negotiations in 1954 - 18 years ago.

That was fifteen years from the earliest date in the indictment.

(2) It reveals the basic facts:

(1) French were negotiating in Geneva with the NLF and the North Vietnamese in 1954 to end the war in VN.

(2) The United States which had been supplying military weapons to the French for many years (covertly and openly) undermined the negotiations and then broke the agreement between the Vietnamese and the French.

(3) It undermined the negotiations by urging the French to continue the military cause and by refusing to take on an active, open negotiations role. [Quote one or two documents]

(d) It breached the agreement by opposing the national elections in VN which had been agreed upon. ~~[Reference: Hurst, special memo which I have]~~

~~[Possible other references:~~

~~general literature: LaGente, etc.]~~

(b) It was the subject of much earlier published writing.

(E) The JCS so-called Wheeler Report of Feb. 27, 1968.

1) references in indictment:

p. 3 - count 1 - Oct. 3, 1969 Ellsberg obtained from Rand
March 4, 1969 - May 20, 1970 Russo possessed it.

p. 6 - count 2 - March 4, 1969 - May 20, 1970 Ellsberg stole it.

8 - count 3 - same time period concealed and retained it.

10 - count 4 - ... conveyed it to Russo.

13 - count 7 - ... Russo received it

15 - count 9 - ... DE received it

October 3, 1969

intending, etc.

16 -- count 10, Mar. 4, 69 - May 20, 70 -- Russo rec.'d

and knowing,

etc.

18 - count 11,

DE delivered

it to Russo.

22 -- count 14,

DE-(unauthoriz

retained it.

Put into Rand

March 1968 by Dan.

Taken out

Oct. 3, 1969

Returned

Oct. 17, 1969

Fingerprints

Tony

Beverly - (who were they)

Wiley - (who were they)

15. Conspiracy to Defraud Governmental Functions.

- (a) Most puzzling aspect of this case.
- (b) Government purpose seems to be that if it cannot secure a conviction on obscure theft charges and equally unsupportable national defense charges, it will try to get the defendants on a third charge. Never used by it in a case like this in the entire history of the country.
- (c) Government theory is that there is a lawful governmental function of keeping classified information from Congress and the public even if it does not relate to national defense, but simply because it is classified.
- (d) Court will eventually instruct you on the two areas not involved in this case in which it is a crime to reveal classified data, namely codes and classified materials to a foreign country or to a communist.
- (e) We shall show that the classification program is and has been found by Congress and by President Nixon to be a highly defective one in which
 - (1) documents are mechanically overclassified.
 - (2) it is very difficult to declassify them.They should be declassified.
- (f) We shall show that in practice the classification program is a political weapon whereby the Government releases or leaks classified data to the press or public or select Congressmen for

partisan political reasons.

(g) We shall show that the release by a government Employee of classified information has never been followed by a criminal prosecution, but by at most disciplinary action as provided by the relevant Executive Order.

(h) We shall show that in at least one case where a state department employee wrongfully leaked information to a Congressional Committee he was merely disciplined by Secretary of State Rusk and then promoted by President Nixon to become Chariman of the Subversive Activities Board.

(i) We shall show that legal officials of the government have for many years had the established practice of reorganizing and giving opinions that leaking classified information is not a crime.

(note: possibly refer to Moorhead hearings unlikely referece to Sorenson, Galbraith etc. affidavits)